No. 3790

United States Circuit Court of Appeals

For The Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

v.

KING COUNTY, WASHINGTON, a Municipal Corporation, CLAUDE C. RAMSAY, LOU C. SMITH and THOMAS DOBSON, Individually and as County Commissioners for King County, Washington,
Defendants in Error.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

HON. EDWARD E. CUSHMAN, *Judge.*

BRIEF OF DEFENDANTS IN ERROR

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STATEMENT OF THE CASE.

During the period from November 1, 1917 to January 1, 1921, King County, one of the political subdivisions of the State of Washington, owned,

maintained and operated for the public benefit a system of public ferries for the transportation of freight and passengers on various routes between the City of Seattle and different points within and without said county and entirely within the State of Washingon. The other defendants in error constitute the members of its Board of County Commissioners.

The complaint alleges that under the Acts of Congress of October 3, 1917, and February 4, 1919, a tax shall be levied, assessed, collected and paid. Said tax to be based upon the amount paid for transportation, by the persons paying for the services or facilities rendered, and that the persons receiving such payments should collect the tax and make monthly returns, and pay over the tax so collected to the Collector of Internal Revenue for the district in which said services were rendered, and that defendants in error and each of them wilfully failed, refused and neglected to make such collections and make such returns from November 1, 1917, to January 1, 1921, as required by law to the Collector of Internal Revenue of the District of Washington, monthly or at any other time by reason of which it is alleged that plaintiff in error has been deprived of the sum of Five Thousand Seven Hundred Nineteen Dollars Four Cents ($5,719.04), and that defendants in error and each of them are, by said Acts of Congress, liable in the sum of Five Thousand Seven Hundred Nineteen Dollars Four Cents ($5,719.04). (Tr. pp. 2-4.)

To this complaint a demurrer was interposed upon the following grounds:

I.

That it appears from the facts of said bill of complaint that the Court has no jurisdiction of the subject matter of said action.

II.

That the said bill of complaint does not state facts sufficient to constitute a cause of action.

III.

That there is a misjoinder of parties defendant in the above-entitled action in that the defendants Claude C. Ramsay, Lou C. Smith, and Thomas Dobson are each impleaded individually.

IV.

That there is a misjoinder of parties defendant in the above-entitled action in that the defendants Claude C. Ramsay, Lou C. Smith and Thomas Dobson are each impleaded as County Commissioners for King County, Washington. (Tr. p. 6.)

Upon argument and submission of the demurrer, the court took the same under advisement and later filed a memorandum decision as follows:

"CUSHMAN, D. J.

"The United States sues to recover from King County and the County Commissioners, a transportation tax, of which it alleges it has been deprived, and which accrued on account of amounts paid for the transportation of freight and passengers on certain ferry-boats maintained and operated by the County.

"In the maintenance and operation of ferries,

the county and its officers are not engaged in a private business, but, on the contrary, are acting in a state and county governmental capacity and for the benefit of the public.

Slaughter-House Cases, 16 Wall. (83 U. S.) 36 at 88;

East Hartford vs. Hartford Bridge Co., 10 How. (51 U. S.) 511.

"Therefore, *So. Carolina vs. U. S.* (199 U. S. 437) is not in point.

"The rule is well recognized that the Government will not tax the State on account of its governmental acts and agencies in the discharge of its duty to the public.

U. S. v. B. & O. R. R. Co., 17 Wall. 322;

Collector v. Day, 78 U. S. (11 Wall.) 113;

Mercantile Bank v. N. Y., 121 U. S. 138;

Van Brocklin v. Tennessee, 117 U. S. 151;

Georgia v. Atkins, 1 Abbott, 22;

Pollock v. Farmers L. & T. Co., 157 U. S. 429;

Evans v. Gore, 253 U. S. 245;

Dobbins v. Commissioners of Erie, 16 Peters, 435.

"Before any statute will be held to have contemplated, or undertaken to authorize the collection by the Federal government of a tax from the county—a governmental subdivision of the State—on account of its action in discharging its duty to the public, in a matter resting within its governmental authority to

such an extent as does the maintenance and operation of a ferry, such intent would have to be clearly and explicitly expressed in the statute, which is not true in the present case.

"Having reached this conclusion, it is unnecessary to determine whether the government has, or has not such an authority.

"The demurrer will be sustained." (Tr. pp. 8-9.)

Thereupon the court made and entered an order sustaining the demurrer and Judgment of Dismissal. (Tr. pp. 13-14).

Thereafter the case was brought to this court by the United States on writ of error proceedings.

ARGUMENT.

Two main questions are presented in this case:

(1) Whether the government has power to impose a tax burden upon a state or its political subdivisions;

(2) Whether it was the intent of Congress that the federal acts above mentioned should apply to states and their political subdivisions.

I.

The Powers of King County as to Public Ferries.

King County has for many years operated a system of public ferries under direct statutory authority.

The Act of 1895 p. 341 provides:

"An Act authorizing cities, towns and coun-

ties to purchase, construct and maintain ferries.

"Section 1. That any incorporated city or town within this state be and is hereby authorized to construct, or condemn and purchase, or purchase and to maintain, a ferry across any unfordable stream adjoining and within one mile of the limits of such city or town, together with all necessary grounds, roads, approaches and landings necessary or appertaining thereto located within one mile of the limits of such city or town, with full jurisdiction and authority to manage, regulate and control the same beyond the limits of the corporation, and to operate the same free or for toll.

"Section 2. That any county within the state be and is hereby authorized to construct, or condemn and purchase, or purchase and to maintain, a ferry across any unfordable stream, together with all necessary grounds, roads, approaches and landings necessary or appertaining thereto, with full jurisdiction and authority, and to operate the same free or for toll."

The Act of 1919 p. 282 provides:

"An Act relating to the powers of counties, authorizing the acquisition and operation of ferries and amending section 5013 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

"Section 1. That section 5013 of Rem. & Bal. Code be amended to read as follows:

"Section 5013. Any county within the state be and is hereby authorized to construct, condemn, or purchase, operate and maintain ferries or boats across, or wharf at, any unfordable stream, lake, estuary or bay within or bordering on said county, or across any body of water separating portions of such county or separating such county from other counties, together with all the necessary boats, grounds, roads, approaches and landings necessary or appertaining thereto, with full jurisdiction and authority to operate and maintain the same free or for toll, by and under the direction and control of the board of county commissioners of such county and as said board shall by resolution determine."

The power thus conferred is *not* with any limitation that they must be operated at a profit, but with full authority to operate the same *free or for toll* as the County Commissioners may determine. This power carries with it authority to levy taxes for free ferries or for such sums, as together with any schedule of tolls, may be needed.

The right to determine whether such operation shall be free, for less than cost, or at a profit rests solely within the discretion of the County Commissioners.

The purpose of the state law is that the ferries shall be operated and maintained as a governmental agency of the state for the benefit of the public by providing means for public travel by water.

II.

The Burden Sought to Be Imposed by the Government Upon King County Is a Substantial One.

The government suggests that it is the person who pays for transportation upon whom the burden of the war tax falls, and not the county. But that is not the burden complained of. It costs money and takes time to collect these war taxes, to keep accounts thereof, and to remit the same. This is one of the burdens which we contend cannot be imposed upon the county.

Then, if the collection be not made, the government seeks judgment against the county for the sum which it is claimed should have been collected. If such a judgment be rendered, it can be satisfied only by the levy and collection of general taxes upon the taxable property of the county. This is the other burden complained of. Both are real and substantial burdens. By law, the auditor of the county keeps the books of account of its ferry system and the county treasurer collects and disburses its funds. Both of these offices are maintained entirely by general taxation.

III.

The Revenue Act Does Not Apply to the States or Political Subdivisiohs Thereof.

A.

It is well recognized that counties are political subdivisions of the state. In 7 R. C. L. p. 925, it is stated that

"The principal purpose in establishing counties is to make effectual the political organization and civil administration of the state, in respect to its general purposes and policy which require local direction, supervision and control, as, for example, over matters of local finance, education, provisions for the poor, the establishment and maintenance of highways and bridges, and, in large measure, the administration of public justice."

In *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, the court declared that counties are *quasi*-municipal corporations, saying (p. 499):

"If what was said in this case was true as to a strictly municipal corporation like a city, it is much more true as to a *quasi* municipal corporation such as a county, for the reason that the latter is an involuntary corporation organized exclusively in the interests of the public and as an agency of the state, while the former may be held to be organized in some sense for the private benefit of its inhabitants."

Again in *State ex rel. Board of Comr's. v. Clausen*, 95 Wash. 214, the court said (p. 222):

"Our constitution makes no special reference to county organizations as such other than to recognize them as legal subdivisions of the state, recognizing those counties existing at the time of the adoption of the constitution and providing for the organization of new counties by the legislature under certain restrictions. As local

subdivisions of the state, counties are created by the sovereign power of the state of its own sovereign will without any necessary particular solicitation, consent or concurrent action by the people who inhabit them. They are created by the state under its sovereign and paramount authority with a view to the policy of the state at large, for political organization, and the administration of governmental affairs. With scarcely an exception, all the powers and functions of county organizations have a direct and exclusive reference to the general policy of the state and are, in fact, but a branch of the general administration of that policy."

In *Rust v. Kitsap County*, 111 Wash. 170, the court said (p. 174):

"Counties are political subdivisions of the state and the state may delegate to, and empower counties with, such public functions as are inherently or properly local, and within such powers and duties prescribed, such functions should be deemed to deal with strictly county purposes, although exercised concurrently with the state."

B.

We now proceed to a consideration of the Acts of Congress and their intent:

The Revenue Act of October 3, 1917, is found in 40 U. S. Statutes at Large, p. 300. It was amended by the Act of February 24, 1919 (p. 1056).

The following statutory provisions are material:

§ 1 (p. 1057), defines terms as follows:

"The term 'person' includes partnerships and corporations, as well as individuals;

"The term 'corporation' includes associations, joint-stock companies, and insurance companies."

§ 201 (p. 303) war excess profits tax, does not apply in case of United States, or any State or Territory or its officers or employes.

§ 500 (pp. 314 and 1101) imposes tax on transportation facilities.

§ 502 (p. 315) appearing in the 1919 Amendment as § 500, sub. (h), p. 1102, exempts for services rendered *to* the United States, or any State or Territory, or the District of Columbia.

§ 502 (p. 1103) provides that every *person* receiving payments under § 500, shall collect the tax and make monthly returns under *oath*, etc. The original act (§ 503, p. 315) said "each person, corporation, partnership or association, etc."

§ 213 (p. 307) directs the Commissioner of Internal Revenue to make the necessary regulations to carry out the provisions of the act and to require any corporation, partnership or individual subject to the provisions of the act to furnish him such facts, data and information as in his judgment are necessary to collect the tax imposed. Regulations 49 were so issued.

§ 500, subdivision (h) (p. 1102), Regulations No. 49, same being Regulations Relating to the Col-

lection of Tax on Transportation and other Facilities, provides (p. 27 of Regulations):

> "No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the commissioner, with the approval of the Secretary, may by regulation prescribe."

Article 68, Regulations No. 49, construing this subdivision, provides (p. 27):

> "The words 'State' and 'Territory' include political subdivisions thereof, such as counties, cities, towns, and other municipalities. The exemption, however, is to be secured only upon the production of such evidence of right to exemption as is called for by these regulations."

There is then, in subdivision (h), § 500, and in Article 68 of the Regulations, an express provision that King County shall be exempt from the payment of this tax *for services rendered to King County.*

The term "carrier" is defined in Article 1, Regulations No. 49, as follows (p. 7):

> "The word 'carrier,' as used in Title V of the revenue act of 1918, is held to mean any person, corporation, partnership, or association who or which, for hire, furnishes any of the transportation services or facilities described or referred to in subdivisions (a), (b), (c), (d) and (e) of section 500 of the act."

The term "person" is defined in Article 3, Regulations No. 49, as follows (p. 7):

> "* * * The term 'person,' as used in the act and in these regulations, includes individuals, partnerships, corporations, and associations."

It is thus apparent that when King County pays for the transportation of persons or property by any carrier it is exempt by law from the payment of any tax. It is also clear that the words "carrier" and "person," as defined in the Regulations, is limited to individuals, persons, partnerships, corporations and associations and does not mention the "state or political subdivisions thereof."

The question then which confronts us is whether this Act of Congress imposes upon King County, as a political subdivision of the State, the burden of acting as an agent for the Federal Government in collecting this tax, and if the act so provides, whether Congress has the constitutional right to impose such burden.

The rule is well recognized that a federal statute will not be construed as placing any burdens upon the states or the political subdivisions thereof, unless the act itself is plain and express in its intent so to do.

In *United States v. Baltimore and Ohio Railroad Company*, 21 L. Ed. 597, an internal revenue tax was levied by Congress upon the interest on railroad bonds, the corporation being required to deduct the

tax. The City of Baltimore owned $5,000,000.00 of these railroad bonds.

The court held,

1. That the act did not apply to the municipality, and

2. That Congress had no power to impose a tax burden on the municipality.

The court said (pp. 599, 600):

> "The creditor here is the City of Baltimore, and the question then arises whether this tax can be collected from the revenues of that municipal corporation.
>
> "There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal Government upon the subjects and in the manner prescribed by the Act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive and judicial departments in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal Government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any inter-

ference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other.

"In the 'Compendium of Internal Revenue Law,' by Davidge & Kimball, it is said (p. 505, *Sayles v. Davis*, 22 Wis. 229), 'Congress may not tax the revenues of a state;' again: 'A national bank cannot be called to account for a tax upon dividends due a State on stock owned by the State.' P. 485, citing 12 Op. Atty. Gen., 402.

"Again: 'The term 'corporation' as used in the Acts of Congress touching internal revenue does not include a State, consequently the income of the State of Georgia from the Western & Atlantic railroad, property owned, controlled, and managed by that State, has not been made by law a subject of taxation.' *Georgia v. Atkins*, 6 Inter. Rev. Rec., 113.

"Again: 'The term 'persons,' as used in secs. 9 and 44, does not include a State. The receipts or certificates issued by the State of Alabama are not subject to the tax of ten per cent. imposed by the Act of Congress of March 25th, 1867.' 12 Op. Atty. Gen. 176."

* * * * * *

"A municipal corporation like the City of Baltimore, is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited

sphere the powers of the State. The State may withdraw these local powers of Government at pleasure, and may, through its Legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."

In *Georgia v. Atkins*, 10 Fed. Cases, 241, the State of Georgia owned a railroad, the net income of which formed a part of the revenue of the state.

The Collector of Internal Revenue demanded a revenue tax on the gross earnings of the railroad. The Court said (pp. 242, 243):

"One other question only need be the subject of examination, and that is whether, under the internal revenue laws, it was the intention of congress that a duty or tax should be collected out of the property owned, controlled, and managed solely by a state; for it is admitted in the pleadings that the Western and Atlantic Railroad is the property of the state of Georgia, exclusively, and that the net income arising from the road is revenue applied to the support of the government of the state. Section 103 of the act of Congress of June 30, 1864 (13 Stat. 275), as amended by that of March 3, 1865 (14 Stat. 135), declares 'that every person, firm, company, or corporation, owning or

possessing or having the care and management of any railroad, canal, steamboat, ship,' etc., 'engaged or employed in the business of transporting passengers or property for hire, or in transporting the mails of the United States, * * * shall be subject to and pay a duty of two and one-half per centum upon the gross receipts of such railroad, canal, steamboat, ship,' etc. The question, narrowed to a point, is this: Does the word or term 'corporation,' for the purposes of this act, and as herein used, include the term 'State?' "

* * * * * *

"I am of the opinion that congress intended the term 'corporation,' as used in this act, to be understood in its general, obvious, and natural meaning; and, therefore, it does not include the term 'state.' And so far as my limited researches go, I am unable to discover a single case in the supreme court, or in any of the circuit or district courts of the United States, wherein it has been decided that the term 'corporation'—body corporate or politic—when used in a statute, includes a 'state,' or where the one term is used as a synonym for the other."

See also *Sherman Co. v. Simonds*, 27 L. Ed. 1093.

We respectfully submit that the Revenue Act discloses no intent to impose a burden by taxation or otherwise upon the state or its political subdivisions.

IV.

The Statute Cannot Constitutionally Apply to the Operation of These Ferries.

Passing the question of whether the act is broad enough in its terms to include the state or its subdivisions, it is submitted that congress is without power to impose this burden upon King County.

The rule is now almost too well settled even to require discussion that the state and its governmental agencies, which obviously includes counties, are exempt from federal taxation.

Collector v. Day, 78 U. S. (11 Wall.) 113; 20 L. Ed. 122;

U. S. v. Baltimore & Ohio Railroad Co., 17 Wall. 322; 21 L. Ed. 597;

Mercantile Bank v. New York, 121 U. S. 138; 30 L. Ed. 895;

Van Brocklin v. Tennessee, 117 U. S. 151; 29 L. Ed. 845;

Georgia v. Atkins, 1 Abbott 22; 10 Fed. Cases No. 5350;

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 39 L. Ed. 759;

Evans v. Gore, 253 U. S. 245; 64 L. Ed. 887.

In the case of *Collector v. Day, supra*, a federal tax was sought to be imposed upon the salary of a state judicial officer. This was held to be beyond the powers of congress. The court after referring to the case of *Dobbins v. The Commissioners of Erie*, 16 Peters 435, in which it had been held that the

state could not tax the salary of a federal judge, held the converse of this to be true in the following language (p. 126):

> "And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is up-held by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

In the case of *U. S. v. B. & O. Ry. Co., supra*, it was held that a municipal corporation within a state could not be taxed by the United States on the dividends or interest of stock or bonds held by it in

a railroad or canal company. The court in part said (p. 599):

> "There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering is undoubted. There are, however, certain departments which are excepted from the general power. The right of the states to administer their own affairs through their legislative, executive and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence the beginning of such taxation is not allowed on the one side, is not claimed on the other."

And in the income tax cases the entire subject was again re-examined by the court and the *B. & O.* case, *supra,* was again affirmed. We quote from that opinion (39 L. Ed. 820):

> "The constitution contemplates the independent exercise by the nation and the state, severally, of their constitutional powers.

"As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.

"A municipal corporation is the representative of the state and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *Buffington v. Day*, 78 U. S. 11 Wall. 115 (20: 122); *United States v. Baltimore & O. R. Co.*, 84 U. S 17 Wall. 322, 332 (21: 597, 601). In *Buffington v. Day, supra*, it was adjudged that Congress had no power, even by an Act taxing all incomes, to levy a tax upon the salaries of judicial officers of a state, for reasons similar to those on which it had been held in *Dobbins v. Erie County Comrs.*, 41 U. S. 16 Pet. 435 (10: 1022), that a state could not tax the salaries of officers of the United States. *Mr. Justice* Nelson, in delivering judgment, said: (Follows quotation from *Collector v. Day* quoted above).

"This is quoted in *Van Brocklin v. Anderson*, 117 U. S. 151, 178 (29: 845, 854), and the opinion continues: 'Applying the same principles, this court, in *United States v. Baltimore & O. R. Co.*, 84 U. S. 17 Wall. 322 (21: 597),

that a municipal corporation within a state could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the state, created by the state to exercise a limited portion of its power of government, and therefore its revenues, like those of the state itself, were not taxable by the United States. The revenues thus adjudged to be exempt from Federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the state or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of a state or of a municipal corporation, which is a political division of the state, from Federal taxation, equally require the exemption of all the property and income of the national government from state taxation.' "

The soundness of these cases was again announced in *Evans v. Gore, supra,* where the court said (p. 893):

"True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here

recognize and sustain, is well settled. In *Collector v. Day* (*Buffington v. Day*), 11 Wall. 113, 20 L. Ed. 122, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in *Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 429, 585, 601, 652, 653, 39 L. Ed. 759, 820, 826, 844, 15 Sup. Ct. Rep. 673, it was held—the full court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a state or any of its counties or municipalities; and in *United States v. Baltimore & Ohio R. Co.*, 17 Wall. 322, 21 L. Ed. 597, there was a like holding as to municipal revenues derived by the city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the states within their own spheres."

The only qualification upon this rule is that announced in *South Carolina v. United States*, 199 U. S. 437; 50 L. Ed. 261. In that case the court held that an excise might be levied upon the sale of intoxicating liquor by agents of the state of South Carolina. This conclusion was by a divided court. and was premised upon the proposition that the exemption from taxation announced in the cases before referred to did not apply where the state

elected to engage in the performance of a purely private business. It was concluded that the business of selling intoxicating liquor was a private business and that consequently the exemption was not applicable.

While the tax here in question is imposed in the original instance upon the passenger, the effect of requiring the state to collect the tax at its own expense and of making it a guarantor of such collection, does not differ in effect than if a direct obligation or burden had been imposed upon the county itself. This is so for at least two reasons: (1) Because the tax cannot be collected except by the expenditure of county moneys, nor can the judgment of the court, if it should be against the defendant King County, be paid except by moneys raised by general taxation; and (2) because the collection of these fares is a means which the state has of raising revenue for the purpose of operating the ferry, and a burden imposed upon that power obviously interferes with the state in raising those revenues.

The case of *Ambrosini v. United States*, 187 U. S. 1; 47 L. Ed. 49, well illustrates this point. In that case it was held that bonds required to be given by the State of Illinois, and the City of Chicago, as a condition precedent to the issue of a liquor license, were exempt from the stamp tax requirement of the War Revenue Act of 1898, for the reason that the state, in requiring the giving of such a bond, was exercising a governmental func-

tion which could not be interfered with by the National government either by an imposition laid upon the state, or upon persons with whom the state might deal. The court in part said (p. 52):

> "The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject and assumes the power to suppress such action."

The case of *Ohio v. Thomas*, 173 U. S. 276; 43 L. Ed. 699, illustrates the same principle as applied to burdens imposed upon states by federal agencies. In that case it was held that a statute of Ohio regulating the use of oleomargarine could not be held applicable to the superintendent of a veterans' home. In the case the court observed (p. 701):

> "Whatever jurisdiction the State may have over the place or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and by Congress. Under such circumstances the police power of the State has no application."

So it may be held in the case at bar that Congress has no power to interfere with the provision made

by the statutes of Washington for the raising of funds to support this ferry by requiring the officers engaged in raising those funds to perform other duties for the benefit of the Federal government.

Likewise in *Johnson v. Maryland*, No. 2, U. S. Adv. Ops., p. 10, decided November 8, 1920, it was determined that a state might not require a Post-Office employe engaged in driving a government motor truck in the transportation of mail over a post road, to obtain an operator's license and pay a fee therefor. In concluding its opinion the court said (p. 11):

> "It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work, and that duty it must be presumed has been performed. *Keim v. United States*, 177 U. S. 290, 293, 44 L. Ed. 774, 775, 20 Sup. Ct. Rep. 574."

We have already shown that the same limitations apply to the government that apply to the state. If a Post-Office employe may not be required to buy a license and show qualifications for driving a mail truck, then it seems equally clear that a state employe cannot be compelled to collect taxes for the Federal government as a condition precedent to the performance of the duties which the state has imposed upon him.

These cases illustrate quite clearly the fact that the theory of these tax cases is not restricted to a direct imposition laid upon the governmental activity of a sovereign state, but likewise applies to any imposition which will operate to prevent the state from exercising such a function. The case also serves to distinquish authorities such as *Merchants National Bank v. Pennsylvania*, 167 U. S. 461; 42 L. Ed. 236, and *National Bank v. Commonwealth*, 9 Wall. 353; 19 L. Ed. 701, cited upon this subject before the lower court by counsel for the government. Those cases hold that a state may lawfully require a national bank to collect taxes imposed upon shares of stock in such bank. The immunity of a national bank from state control is limited merely to those state measures which might interfere with the special federal purpose for which the bank was incorporated. In all other respects such a bank is subject to the laws of the state in the same manner as any other private corporation.

Obviously, the principle of these cases does not apply to agencies of the Federal government en-

gaged in the performance of a governmental function. To illustrate, the state could not impose upon the clerk of this court the duty, at the expense of the government, of collecting a poll tax upon suitors who appear in its courts, and make the government liable should the tax be not so collected, although the state could doubtless do this with a national bank. This distinction exists because the clerk is a special agent of the government and in administering the affairs of this court he is engaged upon a business which is entirely free from state control, either direct or indirect. By the same logic it is apparent that a municipal subdivision of the state, while engaged in a governmental function, cannot be compelled at its own expense and against its will, to act as a tax collector for the government. This must be so because of the lack of power of Congress over the governmental agencies of a sovereign state when engaged in the performance of governmental functions. It is likewise true that the government cannot impose a burden upon those means whereby the state secures revenue sufficient to enable it to perform those functions for which it was created.

The liability of the county and its officers, therefore, depends upon the question of whether the maintenance of this ferry is a strictly private business within the contemplation of the case of *South Carolina v. United States, supra,* or whether it is the exercise of a governmental function within the scope of the authorities first cited herein.

V.

In the Public Operation of Its Ferries the County is Acting in a Governmental Capacity.

We submit that this is the uniform holding of the courts:

In *Hart v. Bridgeport*, 11 Fed. Cas. No. 6149, 13 Blatch. 289, the court distinguished these two functions of the government in the following apt language (p. 682):

> "Public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised either by the state or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Familiar examples of such governmental duties are the duty of preserving the peace, and the protection of property from wrongdoers, the construction of highways, the protection of health and the prevention of nuisances. The execution of these duties is undertaken by the government, because there is a universal obligation resting upon the government to protect all its citizens, and because the prevention of crime, the preservation of health, and the construction of means of inter-communication are benefits in which the whole community is alike and equally interested. Private or corporate

powers are those which the city is authorized to execute for its own emolument, and from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit."

The following excerpts show generally the nature of the business of operating a ferry as viewed at common law and by the various courts:

"It is quite clear, that a ferry is a franchise which none can set up without a license from the Crown, and in the case of a ferry by prescription a grant or license is presumed. As early as in the Year-Book, 22 Hen. 6, 146, it is thus laid down by Paston:

" 'If I have of ancient time a ferry in a town, and another sets up a ferry upon the same river near to my ferry, so that the profits of my ferry are impaired, I shall have against him an action on the case,' and Newton says, 'the case of a ferry differs from that of a mill, for you are bound to sustain the ferry, to serve and repair it, in ease of the common people, and it is inquirable before the sheriff in his town and Justices in Eyre.' "

Huzzey v. Field, 2 C. M. & R., 432.

"A ferry is a liberty, by prescription or the

King's grant, to have a boat for passage upon a great stream for carriage of horses and men for reasonable toll."

From *Termes de la Ley*, cited in *State v. Hudson County Freeholders*, 23 N. J. L. 206 (p. 209):

"A ferry is a franchise which can only be set up by royal license or grant, for the ease of the King's subjects."

Piscary B, citing *Churchman v. Tunstal*, Hardres 163.

"The right to establish and keep a ferry is, in law, termed a franchise. In England franchises are understood to be royal privileges, in the hands of a subject. In this country they are deemed privileges conferred by government."

Benson v. New York, 10 Barb. 224.

"A ferry is a *publici juris*. It is a franchise that no one can erect without a license from the Crown."

Blissett v. Hart, Willes Rep. 512.

"It is a principle of the common law, that ferries are *publici juris* and can be granted by the sovereign power."

Mills v. St. Clair Co. Commrs., 4 Ill. 53.

"The right to establish ferries rests in the legislature."

Carroll v. Campbell, 108 Mo. 550;

Bush v. Peru Bridge Co., 3 Ind. 21.

Establishment of ferries within state's police power.

Fanning v. Gregoire, 57 U. S. (16 How.) 524; 14 L. Ed. 1043;

Conway v. Taylor, 66 U. S. (1 Black) 605; 17 L. Ed. 191.

"A ferry franchise is the creature of sovereign power, and no one can exercise it without the consent of the state."

Murray v. Menefee, 20 Ark. 561.

"The right to establish ferries is an incident of sovereignty, and no individual has a right to establish one without the permission of the government."

Stark v. McGowen, 1 Nott & McC. 307.

"It is a well settled principle of common law that no man may set up a ferry for all passengers without prescription time out of mind, or a charter from the King. He may make a ferry for his own use or the use of his family; but not for the common use of all the King's subjects passing that way."

Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 40, 42 Am. Dec. 716, citing Hargraves Law Tracts, Chap. 2, p. 6, and *Hunter v. Moore*, 44 Ark. 184.

"It is the duty, then, of the sovereign authority to administer in all public affairs; and the establishment of roads, bridges and ferries, has ever been considered as a public affair. It is that in which the whole community is interested. 'One of the principal things that ought to employ the attention of a government, with

respect to the welfare of the public in general, and of trade in particular, relates to highways, canals, etc., in which nothing ought to be neglected to render them safe and commodious.' The construction and preservation of all these works, being attended with great expense, the nation may very justly oblige all those to contribute to them who receive advantage from their use. Vattel 40."

Stark v. McGowen, supra.

In *McQuillin on Municipal Corporations*, Vol. 1, page 514, it is said:

"The use of streets is designed for the public at large as distinguished from the legal entity known as the city, or municipal corporation. The management of highways may be characterized as municipal duties relating to governmental affairs. During the early periods of English history the highways were laid out and constructed directly by the government. The government assumed the immediate and sole management of them, and this was recognized as an essential governmental function.

"In this country the control of highways is primarily a state duty. They are everywhere maintained for the use of the public at large." (§ 227, p. 514.)

Further in the same work, Mr. McQuillin, at page 893, then continues:

"A ferry may be regarded as the continuation of a public highway from one side of the

> water over which it passes to the other. In this sense it is a substitute for a bridge and its end and use is the same."

In *Chilvers v. People*, 11 Mich. 43, a ferry was defined as a public highway or thoroughfare across a stream of water or river by boat instead of by bridge.

In the case of *East Hartford v. Hartford Bridge Co.*, 10 Howard 511; 13 L. Ed. 518; a certain town owned and operated a ferry. The company, under legislative authority owned and operated a bridge, and it was contended that the legislature, by authorizing the operation of the bridge, had repealed the right of the town to operate the ferry. The town contended that it had a proprietary interest in the ferry which the legislature could not impair. The court, however, refused to accept this conclusion, saying (p. 528):

> "The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests."

In *Simon v. Northup*, 30 L. R. A. 171, the Ore-

gon Supreme Court considered the general question in the following language:

"By the transfer to the county contemplated by this act, these bridges and ferries were to continue as public highways (p. 176).

* * * * * *

"The law is now too well settled to be questioned that the public highways of a city are not the private property of the municipality, but are for the use of the general public, and that, as the legislature is the representative of the public at large, it has, in the absence of any constitutional restriction paramount authority over such ways, and may grant the use or supervision and control thereof to some other governmental agency so long as they are not diverted to some use substantially different from that for which they were originally intended. * * * A city occupies as it were, a dual relation to the state—the one governmental or political, and the other proprietary or private. In its governmental or political capacity it is nothing more than a mere governmental agent, subject to the absolute control of the legislature, except as restricted by the Constitution, and such property and easements as it may have in public streets and ways are held by it in such capacity, and at the will of the legislature (p. 177).

* * * * * *

"It is competent for the legislature, in the

exercise of its plenary powers over public highways of the city of Portland, to transfer the management and control of the bridges and ferries in question from the commission appointed by it to the county, and to determine and provide the mode in which the burden of maintaining and keeping them in repair shall be borne in the future." (p. 177.)

The following cases illustrate the generally accepted theory that a ferry is merely a continuation of a highway.

"A public ferry being merely a part of the highway a county may establish such ferries in the absence of special statutory authority."

Reid v. Lincoln, 46 Mont. 31, 125 Pac. 429.

A ferry, in a general sense, is a highway over narrow waters, and is a continuation of the highway from one side of the water over which it passes to the other.

City of New York v. Starin, 106 N. Y. 1, 12 N. E. 631.

"As a link in the chain of transportation on dry land, a ferry forms a part of a public highway, or a connecting link between places in which the public has rights, * * *"

Hackett v. Wilson, 12 Ore. 25, 6 Pac. 652.

"A ferry * * * is but a substitute for a bridge where a bridge is impracticable * * *"

People v. S. F. etc. Ry. Co., 35 Cal. 606-619.

"A boat is undoubtedly the easiest and most

simple way to span a stream which intersects a highway. Before the age of bridges it was the only way of crossing waters too deep to ford and too wide to swim. It became a matter of public concern, therefore, to have a boat stationed where it could be used when needed. Any person might supply this need through business enterprise for the reward which he might obtain through contracting to serve travelers. But this private enterprise was likely to prove wholly inadequate to satisfy the public needs. The boat owner would be inclined to drive hard bargains for his services, and there was nothing to require the boat to be in readiness at all times, whether to the convenience of the owner or not. It was therefore necessary for the public to have some supervision in the matter. The public good demanded that the boat should be at all times in readiness and that the charges should be reasonable and uniform. But to obtain these advantages it was necessary to secure the boatman from ruinous competition, and to make his income certain. The obvious way to accomplish this was to invest him with the royal prerogative, a franchise to take toll and to make the right to operate the ferry exclusive."

Note in 59 L. R. A. 513.

11 R. C. L. 914-915, citing

Patterson v. Wollmann, 5 N. D. 608; 67 N. W. 1040; 33 L. R. A. 536.

This is a leading case on the subject of ferries. It says (p. 537):

> "It is settled law that the right to operate a ferry is not common to all citizens. It is a franchise emanating from the sovereign power. In the absence of a title based on prescription, no one can lawfully maitain a ferry without authority from the state."

Speaking of constitutionality of exclusive franchises the court said (p. 538):

> "A ferry is a moving public highway upon water. The highway upon land meets at either shore with a physical obstruction in the shape of a stream of water. How shall this highway be carried over this stream? The solution of this problem is exclusively within the province of the sovereign power. In this country such power is exercised by the state legislatures. It rests with such bodies, subject to such constitutional restrictions as relate to the matter to determine whether there shall be a bridge or an embankment of earth constructed or a ferry maintained to carry a highway over a stream. * * * The state may exclude all persons from the business. It may run all the ferries itself."

And finally we would direct the attention of the court to the language of Mr. Justice Field in the *Slaughter-House Cases*, 16 Wall. 36; 21 L. Ed. 394, where, in distinguishing legal and illegal monopolies, he observed (p. 412):

> "It is also sought to justify the Act in ques-

> tion on the same principle that exclusive grants for ferries, bridges and turnpikes are sanctioned, but it can find no support there. Those grants are of franchises of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges and ferries for the convenience of the public. * * *"

If a ferry occupies the same category in the realm of municipal activities as does a bridge or a highway, as the authorities all seem to hold, then no one, we apprehend, could with logic contend that the operation of such a ferry is not a governmental function. In legal theory such operation differs in no way from the construction of a highway or bridge. It certainly will not be contended that the Federal government should impose an excise tax upon a state as a condition precedent to the exercise of the privilege of constructing a public highway or bridge for the use of its citizens. This must be so because since the power to tax includes the power to destroy, then the building of highways could be prevented by the exercise of the taxing power of the National government. The judicial knowledge of this court is ample to inform it that no civilized community can now function without highways. They are necessary in times of disorder to enable

officers of the law to protect the sovereignty of the state. They are likewise necessary so that citizens may exercise their right of franchise. The construction of the highway then, is essentially governmental, and a ferry being but a floating highway upon the water is of the same character, and neither is it necessary under the *Ambrosini* case, *supra*, that the burden in question be a direct tax levied upon the state or its subdivisions.

Under the provisions of the Washington Statute (Session Laws of 1895, p. 341, Session Laws of 1919, p. 282), ferries may be maintained either free or by toll. The question of whether or not the expense of performing the function shall be imposed by means of general taxation, or by the collection of moneys from persons especially benefited, obviously does not affect the immunity which the thing to be performed has from federal burdens. If this be so, then it must be conceded that the federal government has no power to impose a tax upon the action of patrons in making contributions to the state for the exercise of this function. The government, we apprehend, would not contend that the United States could colltct from all contributors to the general road and bridge fund of King County a tax of three per cent of the moneys contributed. Certainly this could not be the case because if a tax of three per cent could be exacted then likewise one hundred per cent, or even an arbitrary sum of money could be required. The result then would be that by federal excise the state could be pre-

vented from raising those revenues which are essential to the performance of the things for which the state is created. There can be no difference between such a situation and the one presented here. If the government may not impose an excise upon the tax collecting power of the state, then neither can it impose an excise upon revenues collected by other means. The question in all cases must be tested by its effect upon the state. If that effect is to hamper or interfere with the state in the exercise of a governmental function then it is illegal.

There is no analogy between this case and the case of *South Carolina v. United States, supra.* The business of selling intoxicating liquor is obviously of a private character. There is not the slightest resemblance between the construction and maintenance of a water highway and the business of a rum seller.

In any event, whatever may be said of the *South Carolina* case, it refers with express approval to the case of *United States v. B. & O. Ry. Co.*, 17 Wall. 322. Likewise, the same court in the subsequent case of *Evans v. Gore*, 253 U. S. 245, also approved that case. The *B. & O. Ry. Co.* case, *supra*, held that a federal tax could not be imposed upon revenues received by a municipal corporation of Maryland from funds invested in a private railroad corporation because the investment of municipal funds in a railroad was for the general benefit of the citizens of the municipality and the city, in making such investment, acted in its governmental

capacity. If the investment of municipal funds in a private corporation operated to carry articles of commerce, be beyond the taxing power of the government, then there can be no escape from the conclusion that the direct maintenance of an agency of the same character is likewise free from possible Federal burdens.

Based upon the foregoing principles of law, we respectfully submit:

1. That a judgment based upon the complaint herein would impose a direct and substantial burden by the United States upon a political subdivision and instrumentality of the State of Washington without the consent of the State of Washington, and contrary to the provisions of the 10th Amendment, the 9th Amendment, the 5th Amendment, the first clause of Sec. 8 of Art. I, the 4th clause of Sec. 9, of Art. I and Sec. 4 of Art. IV, all of the Constitution of the United States.

2. That the attempted imposition by the United States or any officer, agent or employe thereof, upon defendants in error Claude C. Ramsay, Lou C. Smith, and Thomas Dobson, individually, of the alleged duty of collecting, accounting for and remitting to plaintiff in error or its authorized representatives of any tax under the Act of Congress of October 3, 1917, as amended by the Act of Congress of February 24, 1919, or of being liable to plaintiff in error in any sum whatsoever for failure, neglect or refusal so to do, as alleged in said bill of complaint, would deprive such defendants in error and

each of them of their property without due process of law, contrary to the provisions of the 5th Amendment to the Constitution of the United States.

3. That the attempted imposition by the United States, or any officer, agent or employe thereof, upon defendants in error Claude C. Ramsay, Lou C. Smith and Thomas Dobson, as County Commissioners of defendant in error King County, of the alleged duty of collecting, accounting for and remitting to plaintiff in error or its authorized representatives any tax under the Act of Congress of October 3, 1917, as amended by the Act of Congress of February 24, 1919, or of being liable to plaintiff in error in any sum whatsoever for failure, neglect, or refusal so to do, as alleged in said bill of complaint, would deprive such defendants in error and each of them of their property without due process of law, contrary to the provisions of the 5th Amendment to the Constitution of the United States, and would constitute a tax upon the salaries of such defendant in error public officers of said King County without the consent of the State of Washington and contrary to the provisions of the 10th Amendment to the Constitution of the United States.

4. That said Acts of Congress and the Regulations promulgated thereunder by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury do not impose upon defendant in error King County, or any officer, agent or employe thereof, any duty to collect, account for or remit to the United States or the authorized repre-

sentative thereof, any taxes specified in Sec. 500 of said Acts, and that any provision of said Acts of Congress or said Regulations attempting to impose or direct the imposition of any such duty is contrary to the provisions of the 10th Amendment, the 9th Amendment, the 5th Amendment, the first clause of Sec. 8 of Art. I, the 4th clause of Sec. 9 of Art. I, and Sec. 4 of Art. IV, all of the Constitution of the United States.

5. That insofar as said Acts of Congress or either of them shall be held and construed to impose any duty and obligation upon defendant in error King County to collect, account for or remit to the United States or the authorized representative thereof any such taxes, the said Acts of Congress and Regulations and each of them are unconstitutional and void as an attempt to tax or burden an agency or instrumentality of the State Government without the consent of the State of Washington, and contrary to provisions of the 10th Amendment to the Constitution of the United States.

CONCLUSION.

We respectfully submit:

1. That the Revenue Act of 1918 does not apply to the State or its political subdivisions.

2. That if it does so apply, the burden which

the Collector of Internal Revenue seeks to impose on King County can only be met from general taxes.

3. That in the public ownership and operation of its ferry system, King County is acting in public or governmental capacity.

4. That Congress is without power, under the Federal Constitution, to enact legislation imposing upon King County the burden of acting as its agent for the collection of revenue taxes or compelling the County to pay to the Collector any such taxes which it has heretofore or may hereafter fail to collect.

5. That Congress is without power to impose a tax upon contributions made by citizens of King County for the support of the county government.

The judgment should be affirmed.

Respectfully submitted,

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